

Brigham Young University Law School BYU Law Digital Commons

Utah Supreme Court Briefs (1965 –)

1981

In The Matter of the Estate of Gertrude Frandsen Shepley, Deceased v. Paul J, Barton, et al. : Brief of Appellants

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errorsElwood P. Powell; Attorney for RespondentRichard L. Bird, Jr.; Attorneys for Petitioners-Appellants

Recommended Citation

Brief of Appellant, *Frandsen v. Barton*, No. 17618 (Utah Supreme Court, 1981).
https://digitalcommons.law.byu.edu/uofu_sc2/2597

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
OF THE STATE OF UTAH

In the Matter of the :
Estate of GERTRUDE FRANDSEN :
SHEPLEY, deceased, :

Respondent, :

Case No. 17618

vs. :

PAUL J. BARTON, et al., :

Petitioners- :
Appellants. :

BRIEF OF APPELLANTS

Appeal From Orders of the Third Judicial
District Court in and for Salt Lake County
The Honorable James Sawaya, Judge

Richard L. Bird, Jr.
David J. Bird
RICHARDS, BIRD & KUMP
333 East Fourth South
Salt Lake City, Utah 84111

Attorneys for Petitioners-Appellants

Elwood P. Powell
CHRISTENSEN, JENSEN & POWELL
900 Kearns Building
Salt Lake City, Utah 84101

Attorney for Respondent

FILED

JUN 26 1981

Clerk, Supreme Court, Utah

TABLE OF CONTENTS

	<u>Page</u>
NATURE OF THE CASE AND DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	9
POINT I: <u>THE DISTRICT COURT IMPROPERLY</u> <u>DENIED THE PETITION FOR AN</u> <u>ORDER REQUIRING RESERVATION</u> <u>OF FUNDS FOR PAYMENT OF ATTOR-</u> <u>NEY'S FEES AND EXPENSES IN</u> <u>THE SPECIFIC PERFORMANCE ACTION</u>	10
A. The Right to Attorney's Fees and Expenses in the Specific Performance Action is Not Dependent Upon Making a Claim Against the Estate	10
B. If the Making of a Claim Against the Estate was Necessary to Preserve the Right to Recover Attorney's Fees and Expenses in the Specific Performance Action, Mr. Barton's Letter of April 1, 1981, Was a Sufficient Claim Against the Estate	12
C. Mr. Powell's Letter of June 17, 1980, is Not a Disallowance of Appellants' Claim for Attorney's Fees and Expenses	16
POINT II: <u>IF A CLAIM AGAINST THE ESTATE WAS</u> <u>NECESSARY AND WAS MADE BUT DIS-</u> <u>ALLOWED, IT WAS AN ABUSE OF DIS-</u> <u>CRETION FOR THE DISTRICT COURT</u> <u>TO DENY APPELLANTS' PETITION FOR</u> <u>AN EXTENSION OF TIME TO CONTEST</u> <u>THE DISALLOWANCE OF THEIR CLAIM</u>	18
CONCLUSION	20

INDEX OF AUTHORITIES

CASES

	<u>Page</u>
<u>Edwards vs. Brimm</u> , 367 S.W.2d 433 (Ark. 1963)	15
<u>Forsyth vs. Estate of Pendleton</u> , 617 P.2d 358 (Utah 1980)	10, 11
<u>Wilson vs. Culbertson</u> , 599 P.2d 1163 (Ore. App. 1979)	14, 15

STATUTES

U.C.A. § 75-3-804(1)	12, 13
U.C.A. § 75-3-804(2)	1, 5, 18, 21
U.C.A. § 75-3-806(1)	16, 17
U.C.A. § 75-3-807	1, 4, 8, 21

IN THE SUPREME COURT
OF THE STATE OF UTAH

In the Matter of the :
Estate of GERTRUDE FRANDSEN :
SHEPLEY, deceased, :

Respondent, : Case No. 17618

vs. :

PAUL J. BARTON, et al., :

Petitioners- :
Appellants. :

BRIEF OF APPELLANTS

NATURE OF THE CASE AND DISPOSITION IN LOWER COURT

This is an appeal from an Order of the Probate Division of the Third Judicial District Court in and for Salt Lake County denying appellants' petition pursuant to U.C.A. § 75-3-807 (misidentified in the original petition as § 75-3-808) for an order requiring the personal representative of the above-named estate to reserve \$10,000 for payment of appellants' claim for attorney's fees and other expenses which may be awarded in their action pending in Carbon County for specific performance of a real estate contract. This is also an appeal from the lower court's order denying appellants' alternative petition pursuant to U.C.A. § 75-3-804(2) for an order granting them an extension of time within which they could commence a proceeding to contest the disallowance of their claim. These rulings were reaffirmed by the lower court by its order of February 25, 1981,

denying appellants' motion for clarification of the earlier rulings. This appeal was taken on March 19, 1981.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the order denying their petition for reservation of funds, and if that relief is not granted, then they seek a reversal of the order denying their petition for an extension of time to contest their claim, if it is held that their claim was disallowed.

FACTS

On November 10, 1979, Charles R. Shepley, as attorney-in-fact for Gertrude Frandsen Shepley, agreed to sell certain real property in Carbon County, Utah, known as the Frandsen Estates to petitioners-appellants (hereinafter "appellants") by signing an Earnest Money Receipt and Offer to Purchase. Lines 45 to 48 of the Earnest Money Agreement provide for the recovery of all expenses of enforcing the agreement, including a reasonable attorney's fee. A copy of the Earnest Money Receipt may be found at R. 42.

In December, 1979, Gertrude Frandsen Shepley died. Charles R. Shepley was appointed personal representative of her estate. In his capacity as personal representative of the estate, Mr. Shepley refused to close the sales transaction, contending that certain shares of water stock were not part of the Sales Agreement, and that the Earnest Money Agreement was

unenforceable. To enforce the rights they have acquired in this property, appellants have already commenced a suit for specific performance and other relief against Charles R. Shepley as personal representative of the Estate of Gertrude Frandsen Shepley.

On February 15, 1980, the personal representative of the estate caused notice to creditors to be published. R. 21. The notice to creditors shows Elwood P. Powell as attorney for the personal representative. On April 1, 1980, Paul J. Barton, representing the appellant partners, sent a letter to Elwood P. Powell, notifying him of their position with regard to the estate's obligations to transfer the shares of water stock and notifying him that under the terms of the Earnest Money Agreement, the estate would be responsible for costs incurred in settling the dispute. A copy of this letter appears at R. 44. Thereafter, Mr. Powell communicated with Charles R. Shepley, the personal representative, with regard to Mr. Barton's letter of April 1, 1980. On June 17, 1980, Mr. Powell sent a letter to appellants' attorney, stating that Mr. Shepley continued to refuse to include the shares of water stock in the purchase price, and further stating the opinion that the Power of Attorney under which Mr. Shepley signed the document on behalf of Gertrude Frandsen Shepley was legally ineffective. Nowhere does Mr. Powell's response mention or even allude to appellants' claim for all costs involved in settling this dispute.

At a hearing in the Carbon County Court, the attorney for the estate stated that they intended to resist the claim for attorney's fees on the ground that no claim for those fees had been made against the estate, although the Carbon County Court had already held that a claim for specific performance did not need to be made against the estate to preserve the right to specific performance. R. 35, 67. Because of their concern that the Carbon County Court might defer to the court probating the estate on this question, because of their belief that they had made a sufficient claim on the estate if one was necessary, and to prevent further passage of time from affecting their right to attorney's fees, appellants determined that the Third District Court, which was probating the Estate of Gertrude Frandsen Shepley, should consider the issues concerning their right to attorney's fees and expenses.

So, appellants petitioned the Third District Court for an order requiring the personal representative to reserve \$10,000 for payment of attorney's fees in case they are awarded in the specific performance action. This petition was pursuant to U.C.A. § 75-3-807(1), which provides that, by petition to the Probate Court,

A claimant whose claim has been allowed but not paid as provided in this section may secure an order directing the personal representative to pay the claim to the extent that funds of the estate are available for the payment.

To protect against the possibility that the Third District Court might find that it was necessary that a claim be made on the estate to preserve the right to attorney's fees, and that a claim was made but disallowed by the estate, appellants also petitioned in the alternative, in the event the petition for the reservation of funds was disallowed, for an order pursuant to U.C.A. § 75-3-804(2) granting an extension of time within which to contest a disallowance of their claim. That section provides for a 60-day period after the personal representative has mailed a notice of disallowance of a claim within which to commence a proceeding on the claim, and further provides that, "in the case of a claim which is not presently due or which is contingent or unliquidated . . . to avoid injustice the court, on petition, may order an extension of the 60-day period."

In support of their petitions, appellants made the following arguments:

1. The claim for attorney's fees and expenses does not require the presentation of a claim against the decedent's estate, but is part and parcel of the claim and action for specific performance, for which no presentation of claim need be made. Hence, the claim for attorney's fees and expenses is automatically allowed (subject to the contingency of an award of such fees and expenses in the specific performance

action), and the petition for reservation of funds to pay such fees and expenses should be granted. R. 22-25, Supplemental Memorandum in Support of Petitions.

2. If the court were to determine that a claim was required to be made, the April 1, 1980, letter from Paul Barth to the attorney for the estate, which stated that "under the terms of the original Earnest Money Agreement signed by your client . . . he will be responsible for the additional costs we incur in settling this matter" (R. 44), was a sufficient presentation of claim against the estate. R. 35-37.

3. The June 17, 1980, letter from the attorneys for the estate (R. 46) was not a disallowance of the claim for attorney's fees and expenses, but merely an assertion that the Earnest Money Agreement was unenforceable against the estate, because of the decedent's alleged incompetence when she executed the Power of Attorney. This was an assertion that the necessary contingency, obtaining specific performance of the Earnest Money Agreement against the estate, would not occur, but not a denial that attorney's fees and expenses would be available if specific performance were ordered. R. 37-39.

4. If a claim were necessary and was made, but the June 17, 1980, letter was a disallowance of the claim, then the interests of justice would be served by the court's order granting the appellants an extension of time within which to contest the disallowance. R. 39-40.

In opposition to appellants' petitions, the estate argued, among other contentions, that no reservation of funds is necessary for attorney's fees, since appellants could claim those fees as an offset to the total purchase price they would have to pay if specific performance is decreed, and that if a reservation of funds is made, it should be on the last \$10,000 appellants pay on the contract. R. 78.

Hearing was held on appellants' petitions on January 7, 1981, before the Honorable James S. Sawaya. After taking the matter under advisement, Judge Sawaya denied their petitions without making any explanation or findings as to the basis for the denials. See, Minute Entry, R. 29. In view of the arguments made in support of and in opposition to the petitions, appellants were unable to determine what effect, if any, the denials would have on their right to attorney's fees in the specific performance action. There appear to be four possible reasons for the denial of the petition for reservation of funds:

1. There is no need to require such a reservation since appellants could retain part of the purchase price owing as an offset to cover any attorney's fees awarded in the specific performance action. A holding on this basis would appear to entail no determination on the necessity of making a claim to preserve the right to attorney's fees.

2. A claim against the estate was not necessary to preserve the right to attorney's fees, hence the prerequisite

of the claim being "allowed" by the estate as required by U.C.A. § 75-3-807(1) is not met. This would be a holding that the petition was inappropriate.

3. A claim was necessary but was not made.

4. A claim was necessary and was made but was disallowed.

There could be similar spectrum of grounds for the denial of the petition for an extension of time to contest disallowance of appellants' claim for attorney's fees. Because the District Court's ruling may or may not have been a determination of the necessity of making a claim for attorney's fees and of the questions whether, if a claim was necessary, one was made and allowed or disallowed, appellants filed a Motion for Clarification of Ruling (R. 51-52) with the District Court, in order to obtain that court's guidance as to the meaning of its order denying their petitions. The hearing on this Motion was held February 25, 1981, and the transcript of that hearing is at R. 65-72. The appellants' attorney attempted to inform the court as to their essential difficulties with the ruling: was it a determination that they could not obtain attorney's fees and expenses in the specific performance action, or did the ruling make no determination of their right to those fees and expenses? But Judge Sawaya believed that denial of the petitions fully conveyed the court's decision (R. 69), and concluded that the petitions were denied on all grounds alleged. R. 70. It

appears to appellants that it was inconsistent for the court to deny their petitions on all grounds alleged, since that would involve determinations that a claim against the estate was necessary and also that it was not necessary and that a sufficient claim was made and also was not made.

Because it appears certain that the estate will argue in the specific performance action that the determination of the court below precludes an award of attorney's fees in that action under the principles of collateral estoppel, though it does not appear that that was the intent of the court below, appellants determined that the appropriate way to protect their right to attorney's fees and expenses was initially to appeal from the denial of their petitions. This appeal was taken March 19, 1981.

SUMMARY OF ARGUMENT

POINT I. THE DISTRICT COURT IMPROPERLY DENIED THE PETITION FOR AN ORDER REQUIRING RESERVATION OF FUNDS FOR PAYMENT OF ATTORNEY'S FEES AND EXPENSES IN THE SPECIFIC PERFORMANCE ACTION.

A. The Right to Attorney's Fees and Expenses in the Specific Performance Action is Not Dependent Upon Making a Claim Against the Estate.

B. If the Making of a Claim Against the Estate Was Necessary to Preserve the Right to Recover Attorney's Fees and Expenses in the Specific Performance Action, Mr. Barton's Letter of April 1, 1981, was a Sufficient Claim Against the Estate.

C. Mr. Powell's Letter of June 17, 1980, is Not a Disallowance of appellants' Claim for Attorney's Fees and Expenses.

POINT II. IF A CLAIM AGAINST THE ESTATE WAS NECESSARY AND WAS MADE BUT DISALLOWED, IT WAS AN ABUSE OF DISCRETION FOR

THE DISTRICT COURT TO DENY APPELLANTS' PETITION FOR AN EXTENSION OF TIME TO CONTEST THE DISALLOWANCE OF THEIR CLAIM.

ARGUMENT

POINT I. THE DISTRICT COURT IMPROPERLY DENIED THE PETITION FOR AN ORDER REQUIRING RESERVATION OF FUNDS FOR PAYMENT OF ATTORNEY'S FEES AND EXPENSES IN THE SPECIFIC PERFORMANCE ACTION.

A. The Right to Attorney's Fees and Expenses in the Specific Performance Action is Not Dependent Upon Making a Claim Against the Estate.

Appellants' claim for attorney's fees and expenses is inseparable from their claim for specific performance. Without a decree granting specific performance, petitioners will have no basis to recover their attorney's fees. A decree of specific performance would fulfill the only prerequisite to an award of attorney's fees. Thus, appellants' right to attorney's fees is an inherent part of the cause of action for specific performance being tried in Carbon County. Since, as the Carbon County District Court has already ruled, a claim for specific performance of a contract to convey real estate need not be made upon the personal representative of an estate in order to preserve the right to maintain that cause of action, the right to attorney's fees and expenses is likewise preserved regardless of the filing of the claim with the personal representative.

Forsyth vs. Estate of Pendleton, 617 P.2d 358, (Case No. 16695 Utah, filed September 2, 1980) (a copy of this case appears at R. 26-28), involved an action for specific performance of a real estate contract. The trial court had

granted specific performance and \$1,000 as attorney's fees. The defendant-executor contended that plaintiff's failure to file a claim prevented his recovery, that plaintiff had abandoned the contract, and that the award of attorney's fees was improper, among other contentions. As to the first contention, the Court stated:

No claim was filed by plaintiff, nor in spite of defendant's contention, was there any need of such claim being filed.

Id., R. 26. After determining that it was necessary to remand on the issue of abandonment of the contract, the Court turned to the attorney's fees issue, and stated:

Finally, defendant argues that there should not have been an award made to plaintiff for attorney's fees. In light of our remand it would seem inappropriate to rule on that question. If, upon the trial court's further proceedings, it is found that there was an abandonment, then plaintiff's entitlement to attorney's fees is rendered moot. If it is concluded that there was no abandonment, then the contract is still in force and the contractual provisions which pertain to attorney's fees applies.

Id., R. 28. In Forsyth, the Supreme Court treated the right to attorney's fees as part and parcel of the right to specific performance, for which no claim need be filed. The same is true in this case. If the District Court in Carbon County grants specific performance, then appellants should be entitled to attorney's fees in that action even if no claim were filed

against the estate in connection with the probate proceedings.

Since a claim for attorney's fees and expenses need not be filed against the estate to preserve the right to obtain such fees and expenses in the specific performance action, the personal representative has no opportunity to disallow such claim, the claim being contingent only upon the award of such fees and expenses in the specific performance action. Hence, the claim is one which is necessarily allowed against the estate subject to that contingency, making it appropriate for the Probate Court to order, pursuant to U.C.A. § 75-3-807(1), that \$10,000 be reserved for the payment of such attorney's fees and expenses in the event that they are awarded. Such an order, even if it requires the reservation of the last \$10,000 of the purchase price to be paid by appellants if specific performance is granted, will prevent the personal representative from making anticipatory assignments to beneficiaries of the purchase money without accounting for the obligation to pay attorney's fees and expenses.

B. If The Making of a Claim Against the Estate Was Necessary To Preserve The Right to Recover Attorney's Fees And Expenses In The Specific Performance Action, Mr. Barton's Letter of April 1, 1981, Was a Sufficient Claim Against The Estate.

If it was necessary for appellants to make a claim against the estate to preserve their right to attorney's fees and expenses, the necessary manner of presentation of that claim would be governed by U.C.A. § 75-3-804, which provides in rele-

vant part as follows:

(1) Claims against a decedent's estate may be presented as follows:

(a) The claimant may deliver or mail to the personal representative a written statement of the claim indicating its basis, the name and address of the claimant, and the amount claimed.

The letter sent by Mr. Barton to Mr. Powell on April 1, 1980, is found at R. 44. That letter directs further correspondence to be to Mr. Richard Bird, with an address given, and states that the basis of the claim for the fees and expenses at issue here is the Earnest Money Agreement signed by Mr. Shepley, and that the amount claimed would be "the additional costs we incur in settling this matter." It would be impossible to have made a more specific claim for such costs at that time, since they were contingent and unliquidated. Hence, the substantive contents of this notice are sufficient.

The remaining question is whether it was sufficient under the statute to send this notice to the attorney for the personal representative rather than to the personal representative himself. The pleadings and papers filed on behalf of the personal representative in the probate action show that Elwood P. Powell has been the attorney of record for the estate throughout. His name appeared in the published Notice to Creditors, found at R. 21. As attorney of record for the estate he was acting as agent for the personal representative on legal matters

of the estate, and it was clearly within the scope of his agency to transmit to and discuss with the personal representative the claims of which he had been made aware. In addition, as an officer of the court with respect to this matter, Mr. Powell had a professional duty to the court to transmit claims to the personal representative. For these reasons, a written claim sent to the attorney for the estate is a sufficient claim made upon the personal representative.

In fact, it is clear that Mr. Powell did discuss with and transmit to Mr. Shepley the appellants' claims. Mr. Powell's June 17, 1980, response to Mr. Barton's April 1, letter (R. 46) states in relevant part as follows:

I have been in touch with the personal representative of the above estate, Charles R. Shepley, and have discussed with him both your letter and Mr. Barton's letter of April 1, 1980.

R. 45.

Utah courts have not ruled on whether a claim mailed to the attorney for the estate of a decedent is sufficient to constitute presentation of the claim to the personal representative. As stated above, that result should follow from the application of agency law to this situation, and from the duty an attorney owes to the court. However, the Oregon Court of Appeals was recently required to rule upon this precise question. In *Wilson vs. Culbertson*, 599 P.2d 1163, 1164 (Ore.

App. 1979), the court stated as follows:

ORS 115.005(1) provides that "claims against the estate of a decedent . . . shall be presented to the personal representative."

Where, as here, a claim made by letter to decedent's business establishment was transmitted to and answered by defendant's attorney on behalf of the estate, the personal representative has notice of the claim and opportunity to resolve it, hence, even though the claim is made indirectly rather than directly, all purposes of ORS 115.005(1) have been accomplished. Accordingly, we hold that the claim has been "presented" to the personal representative within the meaning of the statute.

A similar holding is found in Edwards vs. Brimm, 367 S.W. 2d 433 (Ark. 1963). There, the Arkansas Supreme Court held that a claim made by giving notice to the executrix' attorney in compliance with the statute regarding service on the attorney of record of a party was sufficient as being in substantial compliance with the statute requiring giving notice of filing a claim to the executrix.

For these reasons it should be held as a matter of law that if it was necessary for a claim to be made against the estate to preserve the right to attorney's fees and expenses in the specific performance action, Mr. Barton's April 1, 1980, letter to the attorney for the estate was in substantial compliance with the statutory requirements and fulfilled all the statute's purposes, and should be held to be a sufficient claim.

C. Mr. Powell's Letter of June 17, 1980, Is Not a Disallowance of Appellants' Claim for Attorney's Fees and Expenses.

U.C.A. § 75-3-806(1) provides in relevant part that:

The personal representative may mail a notice to any claimant stating that the claim has been disallowed. . . . Failure of the personal representative to mail notice to a claimant of action on his claim for 60 days after the time for original presentation of the claim has expired has the effect of a notice of allowance.

Mr. Powell's letter of June 17, 1980, (R. 45-46) does not at any point advise appellants that their claim for the costs of enforcing the Earnest Money Receipt and Offer to Purchase is disallowed. It does not even mention appellants' claim for these ~~exp~~enses. The statute just quoted therefore treats the personal representative's silence on appellants' claim as an allowance of that claim.

Of course, appellants' claim against the estate for those ~~exp~~enses was necessarily contingent, both at the time the claim was made and still today. The claim is contingent on the enforceability of the Earnest Money Agreement against the estate, and on a resolution of the dispute regarding the water stock in favor of appellants. Those two issues will be resolved in the lawsuit pending in Carbon County. Mr. Powell's June 17th letter covers both of these issues, by asserting that the water stock was not included in the Earnest Money Agreement

and that Gertrude Frandsen Shepley was not competent at the time she signed the Power of Attorney pursuant to which Charles R. Shepley signed the Earnest Money Agreement in her behalf. Mr. Powell's conclusion that the Earnest Money Agreement is unenforceable against the estate is based upon his legal conclusion that Mrs. Shepley was incompetent. However, the enforceability of the Earnest Money Agreement was one of the contingencies inherent in appellants' claim for the expenses of enforcing that agreement against the estate. Mr. Powell's letter merely asserts that the contingencies which would have to occur for the claim to become an obligation of the estate would not occur. The letter did not deny that the Earnest Money Agreement provides for the expenses of enforcing that agreement, but discussed the merits of the issues now pending before the Carbon County court.

Because the June 17th letter merely stated a legal conclusion on the part of Mr. Powell and Mr. Shepley that the contingencies involved in appellants' claim would not occur, rather than an assertion that the claim would not be owing if those contingencies did occur, the letter did not amount to a disallowance of appellants' claim. Because no other communications were received in the statutory 60-day period, petitioners' claim was allowed by operation of U.C.A. § 75-3-806(1).

POINT II. IF A CLAIM AGAINST THE ESTATE WAS NECESSARY AND WAS MADE BUT DISALLOWED, IT WAS AN ABUSE OF DISCRETION FOR THE DISTRICT COURT TO DENY APPELLANTS' PETITION FOR AN EXTENSION OF TIME TO CONTEST THE DISALLOWANCE OF THEIR CLAIM.

U.C.A. § 75-3-804(2) provides as follows:

If a claim is presented under (1)(a) above, no proceeding thereon may be commenced more than 60 days after the personal representative has mailed a notice of disallowance; but in the case of a claim which is not presently due or which is contingent or unliquidated . . . to avoid injustice the court, on petition, may order an extension of the 60-day period, but in no event shall the extension run beyond the applicable statute of limitations.

Where a contingent claim such as that of appellants is involved, this statute allows the court to grant an extension of time to claimants whose claims have been disallowed when it is in the interests of justice to do so. Although appellants recognize that the statute merely grants the District Court discretion to grant an extension in the interest of justice, appellants believe that it was an abuse of discretion to deny their petition in this case, if a claim was necessary and was made but disallowed.

The personal representative and his attorney were advised of appellants' claim by Mr. Barton's April 1, 1980, letter. Mr. Powell's June 17, 1980, response to this letter was vague and reasonably interpreted by appellants as not addressing their claim for the expenses of enforcing the Earned Money Agreement, but rather as addressing the substantive issue

relating to the enforceability of that agreement which will be resolved in the specific performance action. If it is now determined that that letter was a disallowance of appellants' claim, it would be unfair to preclude them from disputing that disallowance. By refusing to use its discretion, in the interest of justice, by granting an extension of time to contest the disallowance, the District Court has allowed the personal representative to gain an advantage for the estate (and himself as a beneficiary) by treating appellants' claim for attorney's fees and expenses vaguely and indirectly, rather than directly stating whether the claim is allowed or disallowed. It is certainly not the intent of the Probate Code to place a premium on deceptive practices, and the District Court failed to prevent such a result by refusing to use its discretion to allow the appellants' entitlement to attorney's fees to be aired on its merits by granting an extension of time to contest disallowance.

Another factor indicating the propriety of granting an extension of time to dispute the disallowance is the continuing nature of the contingencies upon which the appellants' claim would become an obligation of the estate. As noted above, these contingencies will be resolved in the specific performance action in Carbon County, and only then would the liability of the estate for the expenses of enforcing the Earnest Money Agreement be determined. There has been no delay involved in the deter-

mination of the estate's liability for these expenses. The issue is a collateral one in the specific performance action, and will be determined by the other issues in that action. Hence, the estate has not been prejudiced by any delays in processing petitioners' claim. In addition, there has been no delay in distribution of the estate's assets, since the parties agree that the attorney's fees may be reserved as an offset to the total purchase price which has to be paid if the specific performance action is successful. R. 78, 79.

For these reasons, if a claim for attorney's fees and expenses was necessary and was made but was disallowed by the June 17th letter of Elwood P. Powell, it was an abuse of discretion and clearly contrary to the interests of justice for the District Court to deny appellants' petition for an order extending the time within which to contest the disallowance of their claim.

CONCLUSION

For the purpose of obtaining a determination of their right to attorney's fees in their specific performance action against the Estate of Gertrude Frandsen Shepley now pending in the District Court in Carbon County, and for the purpose of avoiding any prejudice to their right to such fees and expenses by the further passage of time, appellants petitioned the Third District Court in which the estate was being probated pursuant

to what appeared to be the most promising statutes for accomplishing those purposes. Admittedly, those statutes did not supply the perfect vehicle for obtaining a determination on all the relevant issues, but appellants believed when filing their petitions, and still believe, that the issues of the necessity for making a claim for attorney's fees; whether a claim, if necessary, was made against the estate; whether such claim was allowed or disallowed; and whether, if a necessary claim were made but disallowed, the interests of justice required an extension of time to contest that disallowance, were properly brought before the District Court by appellants' petitions pursuant to U.C.A. § 75-3-807 and 75-3-804.

Unfortunately, the District Court's decision on those petitions, a simple denial, without explanation, did not convey any guidance to appellants as to the status of their rights, especially in view of the argument of the estate that a reservation of funds would be unnecessary since the attorney's fees and expenses could be used as an offset to the amounts which will be owing to the estate in the event the Carbon County Court declares specific performance. The District Court's decision may or may not have been intended to be a decision of whether appellants will be entitled to attorney's fees if specific performance is granted, but the possibility that the estate would try to use the decision for its collateral estoppel effect on the right to attorney's fees in the Carbon County

action forced appellants to attempt to determine the basis for the District Court's ruling. That was the purpose for the Motion for Clarification of Ruling, which resulted in no clarification whatsoever. In that posture, and to protect their rights, appellants took this appeal from the denial of their petitions.

The District Court's denial of the petition for reservation of funds was erroneous. First, no claim need have been made against the estate to preserve the contractual right to attorney's fees and expenses which might be awarded in the specific performance action. Hence, the right to such fees and expenses constitutes a claim which is necessarily allowed by the estate subject to the contingency of award in the specific performance action, making appropriate an order reserving funds to pay such fees and expenses. Second, if it was necessary to make a claim against the estate to preserve the right to attorney's fees and expenses, Paul Barton's letter of April 1, 1980, was a sufficient claim, and that claim was not disallowed. A reservation of funds was appropriate, and appellants would be satisfied if the last \$10,000 to be paid by appellants on the purchase price were ordered reserved. This would have clarified their right to attorney's fees and would have prevented the personal representative from making other prior obligations for that money.

Although the estate has claimed that an order reserving funds is unnecessary since the attorney's fees and expenses could be claimed as an offset against the purchase price, without such an order the estate will challenge any claim of offset in the specific performance action as being barred by the claim provisions of the Probate Code. An order reserving the last \$10,000 of the purchase price will settle the issue and prevent the estate from constantly pointing to the "other" pending action as the appropriate one for settling the right to attorney's fees.

Finally, if a claim was necessary but was disallowed, the District Court abused its discretion by refusing to grant appellants an extension of time to contest that disallowance, and its denial should be reversed. There was no testimony and this court need not defer to the impressions of the trial court.

For these reasons, appellants respectfully request this court to reverse the trial court's ruling on the petition to require reservation of funds for the payment of the contingent claim to attorney's fees and expenses, or if appropriate, to reverse the District Court's ruling on the petition for an extension of time within which to contest a disallowance of their claim, if there was a disallowance.

DATED this 26th day of June, 1981.

Respectfully submitted,

RICHARDS, BIRD & KUMP

RICHARD I. BIRD, JR.

David J. Bird
David J. Bird

Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of June, 1981,

I mailed two true and correct copies of the foregoing Brief, postage prepaid, to Elwood P. Powell, CHRISTENSEN, JENSEN & POWELL, 900 Kearns Building, Salt Lake City, Utah 84101.

David J. Bird